No. 77-52

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD T. FORD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

MICHAEL W. FARRELL,
ELLIOTT SCHULDER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1977

No.

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD T. FORD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 550 F.2d 732.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on February 3, 1977. A peti-

tion for rehearing with a suggestion for rehearing *en banc* was denied on May 9, 1977 (Apps. C and D, *infra*). On June 6, 1977, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including July 8, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a writ of *habeas corpus ad prosequendum* issued by a federal court to state authorities, directing the production for trial on federal criminal charges of a state prisoner against whom a federal detainer has previously been lodged, constitutes a "written request for temporary custody" making applicable the terms and conditions of Article IV of the Interstate Agreement on Detainers Act.

2. Whether respondent, by failing to raise the issue in the district court, waived the claim that his indictment should have been dismissed for violation of the Interstate Agreement on Detainers Act.

STATUTES INVOLVED

1. Section 2 of the Interstate Agreement on Detainers Act, 84 Stat. 1397-1402, 18 U.S.C. App., pp. 4475-4477, provides in pertinent part:

Article II

As used in this agreement:

(a) 'State' shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia * * * .

* * * * *

Article III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint * * * .

* * * * *

(c) The warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, in-

formation, or complaint on which the detainer is based.

* * * * *

Article IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: *Provided*, That the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: *And provided further*, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

* * * * *

(c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

* * * * *

Article V

(a) In response to a request made under article III or article IV hereof, the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had * * * .

* * * * *

(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

2. 28 U.S.C. 2241 provides in pertinent part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. * * *

* * * * *

(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * * * *

(5) It is necessary to bring him into court to testify or for trial.

STATEMENT

1. In November 1971 the United States District Court for the Southern District of New York issued a warrant authorizing respondent's arrest for bank robbery. On October 11, 1973, federal agents executing this (and one other) warrant arrested respondent in Chicago. Shortly after his arrest, respondent was turned over to Illinois authorities for extradition to Massachusetts on older, unrelated state charges. Upon respondent's transfer to Massachusetts, the federal bank robbery warrant was lodged as a detainer with Massachusetts prison authorities.

An indictment (74 Cr. 279) filed in the United States District Court for the Southern District of New York on March 21, 1974, charged respondent with bank robbery and aggravated bank robbery, in violation of 18 U.S.C. 2113(a) and (d). Pursuant to a writ of *habeas corpus ad prosequendum* issued by the district court, respondent was produced from Massachusetts for arraignment before the federal court in New York on April 1, 1974; he entered a plea of not guilty to the indictment (R. App. H; Tr. of April 1, 1974, pp. 4-5). Two days later, a superseding indictment (74 Cr. 336) was filed charging respondent and another person, James R. Flynn,

[1] Respondent pleaded guilty to the Massachusetts charges on February 8, 1974, and was sentenced to concurrent terms of 8 to 10 years imprisonment (App. A, *infra*, pp. 2a-3a; R. App. F, ¶ 4). ("R. App." and "G. App." refer, respectively, to respondent's appendix and the government's appendix in the court of appeals).

with the same bank robbery charged in the superseded indictment, and also with use of a firearm in the commission of a bank robbery (18 U.S.C. 924 (c)(1)), interstate transportation of a stolen automobile (18 U.S.C. 2312), and conspiracy (18 U.S.C. 371) (R. App. B). On April 15, 1974, respondent pleaded not guilty to the charges in the new indictment, but co-defendant Flynn failed to appear (Tr. of April 15, 1974, 9:50 a.m., pp. 3-4).[2] Trial was thereafter set for May 28, 1974.

On May 17, 1974, the government moved, on the basis of a showing contained in a sealed affidavit, to adjourn the trial for a period of 90 days or until Flynn was apprehended, whichever occurred first. The motion was granted by the district court, and respondent's trial was rescheduled for August 21, 1974 (R. App. F; Tr. of May 22, 1974, pp. 2-8).[3] On June 14, 1974, respondent sought and was granted permission to be returned to Massachusetts, where his attorney's office was located, in order to facilitate preparation for trial (G. App. 2a; R. App. H; App. A, *infra*, p. 3). In August 1974 the case was reassigned to a different district judge (following the original judge's resignation from the bench) and

[2] Flynn was apprehended on February 14, 1977, and has since been brought to trial and convicted.

[3] In granting the adjournment, the court found no prejudice to respondent in the preparation of his defense and held that the government was entitled to a reasonable interval to attempt to apprehend Flynn so that judicial resources could be conserved by having respondent and his co-defendant tried jointly (Tr. of May 22, 1974, pp. 4, 6-8).

trial was reset for November 18, 1974 (R. App. D, ¶ 12). On November 1, 1974, however, the government requested an additional adjournment of up to 90 days in which to apprehend Flynn, and it filed a second sealed affidavit in support of this motion (R. App. G). On November 4, respondent moved to dismiss the indictment on the ground that he had been denied a speedy trial (R. App. D). The court denied the speedy trial motion, granted the government's application for adjournment, and set a new trial date of February 18, 1975 (App. A, *infra*, p. 4a).

On February 18, the district judge was engaged in a lengthy stock fraud trial, and a new trial date of June 11, 1975, was set. Respondent, although renewing his speedy trial claim, did not request reassignment of the case to another district judge (Tr. of February 18, 1975, pp. 1-4). In the following month, the district court announced a crash program for the disposition of civil cases, to commence June 1. Because of this program, respondent's trial was postponed a final time, until September 2, 1975.

The government secured respondent's presence for trial from Massachusetts prison authorities by means of a writ of *habeas corpus ad prosequendum* issued by the district court on August 8, 1975 (R. App. I). At the beginning of trial, respondent moved again to dismiss the indictment on speedy trial grounds; the motion was denied (R. App. E; Tr. 2-3, 186). Respondent was thereafter convicted by a jury on

all counts.[4] He was sentenced to concurrent terms of five years' imprisonment on each count (App. A, *infra*, pp. 4a-5a).

2. On appeal to the Second Circuit, respondent argued for the first time that his indictment should have been dismissed with prejudice because he had not been tried within 120 days after his initial arrival in the Southern District of New York, in alleged violation of Article IV(c) of the Interstate Agreement on Detainers Act ("Agreement"), and because he had been returned to state custody (following his arraignment) without having first been tried on the federal charges, in alleged violation of Article IV(e) of the Agreement.[5] Article IV of the Agreement provides that the prosecuting authority of a member state which has criminal charges pending against a defendant serving a prison sentence in another member jurisdiction may lodge a detainer with the prison authority of that jurisdiction and, upon written request, obtain temporary custody of the prisoner for purposes of trial. The Agreement further provides that a prisoner so procured must be tried (a) within 120 days of his arrival in the receiving state (except where a continuance is granted "for good cause shown in open co[illegible] in the presence of

---

[4] During the six-day trial, 36 witnesses testified for the government and the stipulated testimony of 12 other witnesses was read to the jury.

[5] The United States joined the Agreement by Act of December 9, 1970, Sections 1-8, 84 Stat. 1397-1403, 18 U.S.C. App., pp. 4475-4478. At all times relevant hereto, Massachusetts was also a party to the Agreement. Mass. Gen. Laws Ch. 276, App. Sections 1-1 to 1-8.

the prisoner or his counsel) and (b) prior to being returned to the sending state, or else the charges against him shall be dismissed with prejudice. Article IV(c), IV(e), and V(c).[6]

A divided panel of the court of appeals reversed the conviction and remanded the case to the district court with directions to dismiss the indictment with prejudice (App. A, *infra*, pp. 1a-29a). The court held that, whether or not a writ of *habeas corpus ad prosequendum* used to secure custody of a state prisoner serves as a "detainer" (see *United States* v. *Mauro*, 544 F.2d 588 (C.A. 2), petition for a writ of certiorari pending, No. 76-1596), "once a federal detainer has been lodged against a state prisoner, the habeas writ constitutes a 'written request for temporary custody' within the meaning of Article IV of the Detainers Act" (App. A, *infra*, p. 21a). The court rejected the government's opposing argument

[6] Article III of the Agreement provides an alternative means by which transfer of the prisoner may be accomplished. Under Article III, prison officials are required to notify each prisoner of any criminal charge on the basis of which a detainer has been lodged against him by another jurisdiction, and, further, to inform the prisoner of his right to request trial on the charges underlying the detainer. The prisoner may then act to clear such a detainer by filing a request with the appropriate authorities in the prosecuting jurisdiction for final disposition of the charge against him. He must thereupon be brought to trial (a) within 180 days of delivery of this request and (b) without being returned to the sending state after his transfer to the prosecuting state, or else the charges are subject to dismissal with prejudice. Articles III (a), III(d), and V(c).

that the Agreement, while allowing prisoners to clear detainers and to compel prompt disposition of pending charges against them (Article III), was not intended to affect the federal government's concurrent right to obtain custody of a prisoner for trial under the power of the writ *ad prosequendum*.[7] The court reasoned that failure to treat a writ as a "request" under the Agreement, if the writ was served after the lodging of a detainer, "would vitiate [the] operation [of the Agreement] insofar as it affects federal detainers, since virtually all federal transfers are conducted pursuant to the writ" (App. A, *infra*, p. 20a); moreover, it would "impair the operation of the Agreement as a whole, since federal detainers form a large percentage of all detainers outstanding" (*ibid.*).[8]

[7] The court also rejected, without discussion, the government's alternative argument that respondent had waived any claim under the Agreement by failing to raise such claim prior to trial (Gov't. Br., pp. 16-18).

[8] After thus concluding that the Agreement was applicable, the court held that the provisions of Article IV(c) had been violated. The majority ruled that the adjournments up to February 18, 1975, were properly granted, but that the subsequent adjournments neither were "for good cause" nor granted with "the prisoner or his counsel being present." App. A, *infra*, pp. 23a-25a. Based upon this violation of the Agreement, the court held that Article V(c) mandated dismissal of the indictment (*id.* at 25a).

In dissent, Judge Moore expressed his unwillingness "to thwart the jury's determination of guilt" on the basis of calendar technicalities, "particularly where no showing of prejudice therefrom has been made" (App. A, *infra*, pp. 28a-29a).

REASONS FOR GRANTING THE WRIT

Article IV(a) of the Interstate Agreement on Detainers provides that the appropriate officer of a jurisdiction in which an untried indictment is pending may have a prisoner who is serving a prison sentence in another jurisdiction and "against whom he has lodged a detainer" made available for prosecution "upon presentation of a written request for temporary custody or availability" to the proper authorities of the incarcerating State. Our petition in *United States* v. *Mauro*, No. 76-1596, presents the issue whether a writ of *habeas corpus ad prosequendum*, directing the production of a state prisoner for federal trial, itself constitutes the "detainer" that is a prerequisite to activation of the terms and conditions of the Agreement.

In the instant case a federal detainer was in fact lodged against respondent, after which his transfer was achieved by means of the writ. The present petition, therefore, presents the important and related question whether a writ of *habeas corpus ad prosequendum* issued after a detainer against a state prisoner has been lodged must be regarded as a "request" making applicable the provisions of Article IV of the Agreement. The court of appeals concluded that, regardless of the correctness of its decision in *Mauro*[9] (see App. A, *infra*, p. 16a), a writ issued by a federal district judge after a detainer has been

[9] The author of the majority opinion below dissented in *Mauro*.

lodged against a state prisoner must be considered a written "request" under the Agreement.

This decision, no less than the court of appeals' prior holding in *Mauro*, has left federal prosecutors profoundly uncertain about whether, and under what conditions, they may continue to use the historic writ of *habeas corpus ad prosequendum* to obtain custody of state prisoners for trial. Although prosecutors often employ the writ to secure the presence of prisoners against whom no detainer has been lodged, as was the case in *Mauro*, in a large number of cases custody of the prisoner is obtained after a detainer has been filed with the state authorities.[10]

Moreover, the problem raised by possible application of the Agreement to cases in which federal charges are prosecuted against state prisoners is one of substantial dimensions. While no statistics are kept regarding the number of *ad prosequendum* writs issued to secure the presence of state prisoners, the United States Attorney for the Southern District of New York, where this case arose, estimates that approximately 100-150 such writs are issued annually to state prison authorities in relation to trials in that district alone, a figure equalling approximately five percent of all defendants against whom criminal charges are preferred. If the experience of that

[10] Although this case and *Mauro* involve related issues under the Agreement, resolution of either case alone would likely not be dispositive of the other. In view of this fact, and the fact that numerous writs are issued both with and without the lodging of detainers, we do not recommend that the Court grant one petition while holding the other petition pending its disposition.

district, which accounts for about four percent of the nationwide total of federal criminal prosecutions,[11] is typical, there may be 2,500-3,000 defendants each year whose cases could be affected by the disposition of the issues raised in *Mauro* and in the instant case.

Federal prosecutors thus need to know with certainty what effect, if any, the lodging of a detainer will have upon the procedures that they follow to obtain state prisoners against whom federal charges are pending. The issue is further complicated by the fact that the Speedy Trial Act of 1974[12] establishes procedures governing the transfer and prosecution of state prisoners that in some respects differ widely from those set forth in the Agreement. As a consequence of the decisions in this case and *Mauro*, federal prosecutors in the Second Circuit apparently must observe one set of standards for obtaining and trying state prisoners and a second set of standards for obtaining and trying federal prisoners. Granting the petitions in *Mauro* and this case will permit this Court to define the government's obligation with respect to the transfer of state prisoners by clarifying the relationship between the Agreement, the Speedy Trial Act, and the writ of *habeas corpus ad prosequendum*.

---

[11] In fiscal 1976, federal criminal charges were filed against 58,794 individuals nationwide, including 2,370 individuals in the Southern District of New York. See *1976 Annual Report of the Attorney General of the United States* 24.

[12] 88 Stat. 2076-2085, 18 U.S.C. (Supp. V) 3161 *et seq.*

1. Contrary to the decision below, we submit that neither the purpose nor the terms of the Agreement compels the conclusion that in enacting it as federal law, Congress intended to impose new and more rigorous conditions on federal prosecutors who obtain state prisoners by use of the writ of *habeas corpus ad prosequendum*. The United States, which has historically obtained state prisoners by use of the writ, did not become a party to the Agreement until 1970, shortly after this Court ruled that States had to expand their efforts to obtain federal prisoners facing state charges in order to assure them speedy trials. *Smith* v. *Hooey*, 393 U.S. 374; *Dickey* v. *Florida*, 398 U.S. 30. At that time, therefore, it was especially important that the States be given a practical and efficient method of obtaining federal prisoners for trial on state charges. Article IV of the Agreement thus allows member States to obtain federal prisoners in the simplified manner used to obtain prisoners from other member States; on the other hand, it provided no comparable benefits to federal prosecutors who were already empowered to secure state prisoners by writ of *habeas corpus ad prosequendum*.

Read against this background, the language of several provisions of Article IV raises severe doubt that Congress intended to subject federal prosecutions maintained with the aid of writs of *habeas corpus ad prosequendum* to the terms of the Agreement. For example, the speedy trial provisions of Article IV(c) invoked by respondent here apply to "any proceeding made possible by this article." Although that lan-

guage seems appropriate in the case of a State receiving custody of a prisoner under the Agreement rather than through the cumbersome extradition process, it has no application when the federal government proceeds by the traditional writ of *habeas corpus ad prosequendum*. Production of state prisoners pursuant to the writ had been routine well before 1970 and was not in any sense "made possible" by federal subscription to the Agreement.

In addition, Article IV(a) provides that "there shall be a period of thirty days after receipt * * * before the request [for temporary custody] be honored, within which period the Governor of the sending State may disapprove the request * * *, either upon his own motion or upon motion of the prisoner." Were this provision deemed applicable to writs of habeas corpus, it could severely limit the efficacy of an instrument that this Court has recognized as a "necessary * * * tool for jurisdictional potency as well as administrative efficiency." *Carbo* v. *United States*, 364 U.S. 611, 618.[13]

[13] While the Court in *Carbo* left open the question whether the nationwide enforceability of the writ of habeas corpus depended upon cooperation by the States (364 U.S. at 621, n. 20), it seems strained at best to conclude that Congress abandoned any claim that the writ constitutes compulsory process by adopting the Agreement or that it thereby redefined the writ as an administrative "request" subject to disapproval by the Governor of a sending State. Before Congress is held to have imposed such limitations on exercise of the writ, the statute or legislative history should indicate a clear intention to do so. *Rosencrans* v. *United States*, 165 U.S. 257, 262-263; see *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 168-169. The legislative history of the Agreement contains no suggestion of any such congressional intent. As the Fifth Circuit noted in *United States* v. *Scallion*, 548 F.2d 1168, 1173, the committee reports simply do not mention the writ.

2. The conclusion of the court of appeals that Congress intended in 1970 to impose new and stringent conditions on use of the writ of *habeas corpus ad prosequendum* by federal prosecutors also is inconsistent with Congress' enactment four years later of the Speedy Trial Act of 1974. In that legislation Congress included specific provisions governing the interjurisdictional transfer of a prisoner "charged with an offense [and] serving a term of imprisonment in any penal institution." 18 U.S.C. (Supp. V) 3161(j)(1). The Act requires the government either to "undertake to obtain the presence of the prisoner for trial" or to "cause a detainer to be filed with the person having custody of the prisoner," who is then obliged to inform the prisoner of the detainer and of his right to demand a trial. If such a demand is made, the government must promptly seek to obtain the prisoner's presence. 18 U.S.C. (Supp. V) 3161(j)(1) to (3).

Although these provisions in some respects echo those of the Agreement, in other and significant respects they are quite different. Thus, the Speedy Trial Act provides that trial must take place within 60 days of arraignment (18 U.S.C. (Supp. V) 3161(c)) while the Agreement provides that trial must occur within 120 days of arrival of the prisoner in the receiving State (Article IV(c)). On the other

hand, the Act has elaborate tolling provisions, which the Agreement does not. Similarly, the Agreement provides that the prisoner may not be returned to the sending state before trial (Articles III(D), IV(e)); the Act has no such provision.

Nothing in the language or legislative history of the Speedy Trial Act suggests a belief by Congress that the United States was already operating under a comprehensive scheme governing the federal trial of state prisoners—which the Agreement, as construed by the court of appeals here and in *Mauro*, would be. Indeed, the legislative history refers only to similar arrangements among States and suggests by negative implication that the federal government was not thought to be subject to comparable restrictions. There is no evidence of congressional recognition of the potential redundancy of this portion of the Speedy Trial Act. Although the enactments of a later Congress are not conclusive regarding the intent of an earlier Congress, the Speedy Trial Act nevertheless makes less tenable the proposition that Congress, in adopting the Agreement, had intended to define the exclusive terms upon which the federal government might obtain custody of prisoners for prosecution. See *Califano* v. *Sanders*, No. 75-1443, decided February 23, 1977, slip op. 6-7.

3. The court of appeals, in holding that the writ *ad prosequendum* becomes a "request" under the Agreement once a detainer has been lodged, stressed that the Agreement was intended to remedy the negative effects of outstanding detainers upon pro-

grams of prisoner rehabilitation and noted the fact that "federal detainers form a large percentage of all detainers outstanding" (App. A, *infra*, p. 20a). That reasoning, however, provides little basis for subjecting the United States to Article IV's conditions on cooperative transfers between member States. As previously noted, Article III provides that a prisoner must receive notice of any detainer lodged against him and that he may thereafter request, and must receive, speedy disposition of all charges to which the detainer relates. Thus the prisoner in any event retains the choice whether to endure the possible effects (if any) of an outstanding detainer or face prompt trial and perhaps conviction for another offense. So long as the prisoner is free to require disposition of charges under Article III of the Agreement, there is no compelling reason to attribute to Congress an intent to make federally-initiated transfers by writ of *habeas corpus ad prosequendum* subject to the restrictions of Article IV as well.[14]

4. Even if the provisions of Article IV(c) are applicable and were violated in this case, we believe that respondent waived any such violation by failing to present the issue to the district court. Respondent

---

[14] The policies underlying the Agreement were fully served in this case. As the record illustrates, respondent's ability or desire to participate in rehabilitation programs was not seriously impaired by the existence of the detainer, for following his return to Massachusetts at his own request, respondent participated in a meaningful program and succeeded in earning a high school equivalency diploma. Additionally, there is no evidence that respondent was hampered in preparing his defense as a result of the delay in proceeding to trial.

offered no explanation for his failure to raise this claim until his appeal, nor are there any exceptional circumstances present here which otherwise require that this omission be excused.[15] His failure to invoke the Agreement here in a timely fashion should have precluded the court below from considering his claim. This is particularly so because a timely assertion of the contention that his case was subject to the restrictions of Article IV of the Agreement might have alerted the prosecution and the district court to the problem and caused the proceedings to be conducted in conformity with the strictures of Article IV.

In *United States* v. *Scallion*, 548 F.2d 1168, 1174, the Fifth Circuit held, in considering a claim under the Agreement that it also rejected on other grounds, that the defendant had waived any violation of Article IV's speedy trial provisions "by failing to present the issue to the district court or this court prior to his amended petition for rehearing" (548 F.2d at 1174). The court noted (*ibid.*) that failure to raise even a constitutional speedy trial claim before or during trial has been held a waiver of that claim (see *United States* v. *Ferrara*, 458 F.2d 868, 875 (C.A. 2), certiorari denied, 408 U.S. 931; *Peo-*

[15] Respondent twice moved to dismiss the indictment on traditional speedy trial grounds, but he never invoked any right under the Agreement until his appeal. Respondent's motions to dismiss for an asserted violation of his constitutional speedy trial right should not be permitted to do service for his failure to raise in a timely manner the specific claim of noncompliance with the terms of the Agreement.

ples v. *Hocker*, 423 F.2d 960, 966 (C.A. 9); *Peterson* v. *United States*, 405 F.2d 102, 108 (C.A. 8), certiorari denied, 395 U.S. 938; see also *Barker* v. *Wingo*, 407 U.S. 514, 531-532) and that the defendant "ha[d] offered no explanation for his failure to raise the Agreement issue before the district court or earlier on his appeal * * *" (548 F.2d at 1174). Although the court of appeals in the present case did not discuss the government's waiver argument (see note 8, *supra*), its decision necessarily places it in conflict with the position of the Fifth Circuit.[16]

The importance of this separate issue depends, of course, upon the applicability of the Agreement in the first place. After the decision of the district court in *United States* v. *Mauro*, *supra*, numerous prisoners who had been obtained from state prisons by writ of *habeas corpus ad prosequendum* began asserting rights under the Agreement, often for the first time on appeal or on motions for collateral relief.[17] Should this Court hold that the Agreement

[16] In *United States* v. *Cyphers and Ferro*, C.A. 2, Nos. 76-1131, 76-1160, decided February 8, 1977, petition for rehearing and rehearing *en banc* denied on June 29, 1977, in which a detainer had been lodged against the defendant, the Second Circuit noted that there had been "no showing that [defendant] knew, prior to trial, that [a] detainer had been lodged against him" (slip op. 1745). Under those circumstances the court held that the defendant properly invoked the Agreement for the first time on appeal.

[17] We are informed by the United States Attorney for the Eastern District of New York that in that district alone approximately 20 prisoners have recently sought relief under 28 U.S.C. 2255, raising the applicability of the Agreement to transfers by writ of *habeas corpus ad prosequendum*.

applies to prosecutions aided by such transfers, the question whether defendants in those waived their rights by neglecting to raise the issue before or during trial would assume substantial importance. In that event, we would urge this Court to resolve the existing conflict between the Second Circuit and the Fifth Circuit on this issue.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

MICHAEL W. FARRELL,
ELLIOTT SCHULDER,
Attorneys.

JULY 1977.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 419—September Term 1976

(Argued November 5, 1976
Decided February 3, 1977)

Docket No. 76-1319

UNITED STATES OF AMERICA, APPELLEE

—against—

RICHARD T. FORD, DEFENDANT-APPELLANT

Before: MOORE, MANSFIELD AND MESKILL, *Circuit Judges.*

MANSFIELD, *Circuit Judge:*

After lodging a detainer against appellant with state prison authorities in Massachusetts, where he was incarcerated, the federal government, on March 24, 1974, used a writ of habeas corpus ad prosequendum to obtain appellant's presence in the Southern District of New York for purposes of arraignment

on charges arising out of a Middletown, New York, bank robbery.[1] Despite his repeated requests for a prompt trial and despite the fact that Article IV(c) of the Interstate Agreement on Detainers Act (Detainers Act)[2] requires trial within 120 days unless continuances are granted for good cause in open court, the imprisoned appellant was not tried until September 2, 1975, more than 17 months later. Because of the failure to comply with the speedy trial requirements of Article IV(c) and because Article V(c) of the Act mandates that in such event the indictment be dismissed with prejudice, we reluctantly reverse, with directions to dismiss the indictment.

Federal authorities arrested appellant in Chicago on October 11, 1973, on two federal warrants—one for bank robbery issued by the Southern District of New York and one for unlawful flight issued by the District of Massachusetts. The unlawful flight charge was dismissed but appellant also faced various state charges filed against him in Massachusetts. He was therefore turned over to Chicago authorities for extradition to Massachusetts for trial on state charges, and the federal warrant issued by the Southern Dis-

[1] Appellant was charged with bank robbery in violation of 18 U.S.C. § 2113(c), using firearms to commit the bank robbery in violation of 18 U.S.C. § 924(c)(1), transporting a stolen automobile from Massachusettes to New York two days prior to the bank robbery in violation of 18 U.S.C. §§ 2312 & 2, and conspiracy to commit the above offenses in violation of 18 U.S.C. § 371.

[2] Pub. L. No. 91-538, §§ 1-8, 84 Stat. 1397 (1970), reprinted in 18 U.S.C.A. app. at 111 (Supp. 1976).

trict for bank robbery was lodged with the Massachusetts authorities as a detainer. Appellant pleaded guilty to the Massachusetts charges and was sentenced to concurrent terms of 8 to 10 years.

On March 21, 1974, an indictment for bank robbery was filed in the Southern District of New York, and on March 24 a writ of habeas corpus ad prosequendum was used to obtain custody of appellant for arraignment. On April 1, the government filed its notice of readiness for trial as required by Rule 4 of the Plan for the Prompt Disposition of Criminal Cases of that district. Two days later, however, the government filed the present susperseding indictment, naming in addition one James P. Flynn, who thereupon took flight. On April 15, appellant pleaded not guilty. Trial was set for May 28, 1974.

Shortly before trial was to commence, on May 17, the government requested the first of what was to become a long series of delays, moving to adjourn the trial for 90 days or until Flynn was apprehended, whichever came first, and supporting its motion by sealed affidavit. Over appellant's vigorous protests, the motion was granted and trial was set for August 21. Following the granting of the adjournment, appellant requested to be returned to Massachusetts custody, so that he and his attorney could more conveniently prepare for trial and because his family was in Massachusetts. He was returned on June 14, 1974.

In August, after the original judge, Judge Bauman, resigned from the bench, the case was assigned

to Judge Motley. Without explanation, the trial date was postponed to November 18. On November 1, the government again moved for an adjournment of 90 days within which to ap prehend appellant's co-defendant, again supporting its motion by sealed affidavit. On November 4 the defense moved to dismiss the indictment on the ground that appellant had been denied a speedy trial. The district court denied the speedy trial motion and granted the further adjournment, setting trial for February 18, 1975.

On the date set for trial, however, the trial judge was engaged in another trial. Despite the fact that we had recently emphasized that calendar congestion could not justify delay of a criminal trial and stated that under such circumstances the trial judge should *sua sponte* transfer the case to another judge for prompt trial,[3] trial was postponed another four months, to June 11. The defense reiterated its speedy trial objections. In the following month the Southern District of New York undertook a crash program for civil cases, to begin June 1. When the government sought to ascertain whether appellant's trial would be affected, Judge Motley, *sua sponte*, set a new trial date of September 2, 1975. Defense counsel was subsequently notified.

On August 8 the government obtained appellant from Massachusetts for trial by way of a second writ of habeas corpus ad prosequendum. At the beginning of trial appellant against moved for a dismissal of

[3] *United States* v. *Drummond*, 511 F.2d 1049, 1053 (2d Cir.), *cert. denied*, 423 U.S. 844 (1975).

the indictment for failure to provide a speedy trial. This motion, like his first, was denied. Appellant was convicted on all counts and was sentenced to concurrent 5-year terms. Judge Motley recommended that the federal terms be allowed to run concurrently with the Massachusetts state terms appellant was already serving.

Discussion

Because we uphold appellant's claims under the Detainers Act, we need not discuss his other claims.[4] Many of the questions treated by the government here as open were recently settled in this circuit by our decision in *United States* v. *Mauro*, Slip Opin. at 265 (2d Cir. Oct. 26, 1976) (Dkt. Nos. 76-1251, 76-1252), where we held that under the Detainers Act the United States is bound by the statute's definition of it as both a sending and a receiving "State" and that the writ of habeas corpus ad prosequendum constitutes a "detainer" and a "request" by a prosecuting authority within the meaning of the Act, with the present author dissenting in that case from the majority's holding that a writ of habeas corpus ad prosequendum constitutes a "detainer." The government here, however, has conceded that appellant in this case was subject to a detainer, separate and apart

[4] In addition to his Detainer Act arguments, appellant claims that the government failed to file a notice of readiness for trial of its second indictment within six months as required by Rule 4 of the Plan for Prompt Disposition of Criminal Cases of the Southern District of New York and failed to accord him a speedy trial as required by the Sixth Amnedment.

from the writ, filed by it with the Massachusetts authorities.[5] Whether the writ independently constitutes a detainer, therefore, is not at issue here.

Granting that appellant here was subject to a "detainer" and that he was obtained by the federal authorities through a "request" as that term is used in Article IV(a) of the Act, under *Mauro* it is clear that the Detainers Act applies. Strictly speaking, this case therefore presents only two questions under the Act: (1) whether the Act was violated and, (2) if so, whether such violation warrants reversal of the conviction below. Because the government argues strenuously that the writ of habeas corpus cannot constitute a "request" under Article IV of the Act, however, we will begin with a review of the reasons for our disagreement with the government's position.

The government's argument rests upon a proviso in Article IV(a) to the effect that, after receipt by appropriate state authorities of a request from another jurisdiction for custody of a prisoner, there shall be a 30-day waiting period during which the governor of the sending state may disapprove the request and thus in effect dishonor it.[6] If a habeas writ

---

[5] Warrants are commonly used as detainers. See Note, 48 Column. L. Rev. 1190, 1190-91 & nn.6-7 (1948).

[6] The text of the proviso reads as follows:

> "*And provided further*, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner."

Article IV(a).

were treated as a "request," the argument goes, the effect would be a *sub silentio* partial repeal of 28 U.S.C. § 2241(c)(5), which authorizes a federal court to command a state custodian to turn over a prisoner to federal authority, presumably without delay or the right to disapprove.[7] Since a partial repealer of that section should not lightly be inferred, see *Rosencrans* v. *United States*, 165 U.S. 257 (1897), the argument goes, the writ should not be held to constitute a "request," and therefore the government here should be freed from the trial limitations of the Detainers Act.

Although the government's argument might at first blush appear to have some theoretical appeal, the history and purpose of the Act indicates that the Article IV(a) proviso was aimed merely at preserving the existing law with respect to interstate transfers, under which the governor of the sending state might refuse to turn over a prisoner to another state, as distinguished from federal authorities. However, regardless of the reach of that proviso—and this issue is not before us, since the Governor of Massachusetts has never refused to honor the federal writ of habeas corpus commanding that Ford be produced—a review

---

[7] 28 U.S.C. § 2241(c)(5) provides:

> "The writ of habeas corpus shall not extend to a prisoner unless— . . . (5) It is necessary to bring him into court to testify or for trial."

of the structure and purposes of the Detainers Act makes it abundantly clear that its speedy trial provisions were intended to apply to the federal government as a "State" under the Act.

The Detainers Act was originally drafted in response to a variety of problems arising out of the then unregulated system of detainers commonly used where one or more jurisdictions had charges outstanding against a prisoner held by another jurisdiction. Under that system, once one of the jurisdictions had tried and convicted him the other jurisdictions, instead of trying him on their charges, would simply file detainers with the prison authorities holding him. The detainers would serve to notify the prison authorities that charges were pending against the prisoner elsewhere. Upon the prisoner's completion of the first prison term, the second jurisdiction could bring the defendant to trial on its own charges and, should a conviction be obtained, still other jurisdictions desiring to press charges might then file detainers with the prison where he was next incarcerated.

The disadvantages and potential abuses of this system were many.[8] Prison authorities often accorded

[8] The detainer system has evoked a considerable amount of critical controversy. See, e.g., Hincks, The Need for Comity in Criminal Administration, Fed. Prob. 3 (July-Sept. 1945); Bennett, The Correctional Administrator Views Detainers, Fed. Prob. 8 (July-Sept. 1945); Perry, Effect of Detainers on Sentencing Policies, Fed. Prob. 11 (July-Sept. 1945); Heyns, The Detainer in a State Correctional System, Fed. Prob. 13 (July-Sept. 1945); Bates, The Detained Prisoner and His Adjustment, Feb. Prob. 16 (July-Sept. 1945); Note, The

detainers considerable weight in making decisions with respect to the terms and conditions of the prisoner's incarceration and release on parole. Sometimes the prisoner would automatically be held under maximum security.[9] Sometimes he would be ineligible for special work programs, athletic programs, release for visits to relatives' death beds or funerals, or special minimum security facilities.[10] Often detainers pre-

Detainer: A Problem in Interstate Criminal Administration, 48 Column. L. Rev. 1190 (1948); Donnelly, The Connecticut Board of Parole, 32 Conn. B.J. 26, 45-48 (1958); Bennett, "The Last Full Ounce," Fed. Prob. 20 (June 1959); Comment, The Detainer System and the Right to a Speedy Trial, 31 U. Chi. L. Rev. 535 (1964); Note, Convicts—The Right to a Speedy Trial and the New Detainer Statutes, 18 Rutgers L. Rev. 828 (1964); Schindler, Interjurisdictional Conflict and the Right to a Speedy Trial, 35 U. Cin. L. Rev. 179 (1966); Note, Detainers and the Correctional Process, 1966 U. Wash. L. Rev. 417; Note, Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions, 77 Yale L.J. 767 (1968).

[9] See, e.g., Note, 1966 Wash. U.L.Q. 417, 418 n.10. In *United States* v. *Maroney*, 194 F. Supp. 154, 156 (W.D. Pa. 1961), a 19-year old defendant was sent to a "maximum medium" institution while his 20-year old co-defendant was sent to an institution for youthful offenders, solely because of a charge pending against the former.

[10] See, e.g., *United States* v. *Candelaria*, 131 F. Supp. 797, 799, S.D. Cal. 1955) (because of detainer, defendant denied trusty status, parole, outside work, good inside work assignments); *United States* v. *Maroney*, 194 F. Supp. 154, 156 (W.D. Pa. 1961) (outside work and good inside work assignments); *State* v. *Baker*, Crim. No. 85611 (C.P. Hamilton Cty. Ohio, March 30, 1966) (federal honor farm rights, good behavior job privileges); Note, 48 Colum. L. Rev. 1190, 1192 & n.19 (1948) (trusty status); Donnelly, 32 Conn. B.J. 26, 47 (1958) (trusty status, transfers to farms and work

cluded the granting of parole.[11] Despite these serious consequences, virtually any law enforcement officer—prosecutor, policeman, or judge—could file a detainer without any procedural prerequisites.[12] No pending

---

camps); Note, 1966 Wash. U.L.Q. 417, 418-19 & nn.11-16, 421-22 n.22 (transfers to minimum security areas, trusty status, job assignments, honor camps, athletic contests, visits to death beds or funerals, Christmas discharge). See also Note, 18 Rutgers L. Rev. 828, 835 (1964); Schindler, 35 U. Cin. L. Rev. 179, 181 (1966).

[11] See, e.g., *United States* v. *Maroney*, 194 F. Supp. 154, 156 (W.D. Pa. 1961); *Pellegrini* v. *Wolfe*, 225 Ark. 459, 283 S.W.2d 162 (1955); *Ex parte Schechtel*, 103 Colo. 77, 82 P.2d 762, 763 (1938); *State* v. *Kalkbrenner*, 263 Minn. 245, 116 N.W.2d 560 (1962); *Jones* v. *State*, 164 So.2d 799, 800 (Miss. 1964); *State* v. *Milner*, 78 Ohio L. Abs. 285, 286, 149 N.E.2d 189, 190 (C.P. Montgomery Cty. 1958); *Cane* v. *Berry*, 356 P.2d 374 (Okla. Crim. App. 1960); Hincks, Fed. Prob. 3, 3 (July-Sept. 1945); Heyns, Fed. Prob. 13, 14 (July-Sept. 1945); Note, 48 Column. L. Rev. 1190, 1193 & n.22 (1948); Donnelly, 32 Conn. B.J. 26, 47 (1958); Note, 1966 Wash. U.L.Q. 417, 420-21 & nn.17-21. See also Note, 18 Rutgers L. Rev. 828, 835 (1964). The United States Board of Parole changed its automatic denial policy to one of individual evaluation in 1954. Bennett, Fed. Prob. 20, 22 (June 1959).

[12] See, e.g., *State ex rel. Faehr* v. *Scholar*, 106 Ohio App. 399, 155 N.E.2d 230 (1958) (denying mandamus to force chief of police to file affidavit and warrant against petitioner or, in the alternative, to withdraw detainer); Schindler, 35 U. Cin. L. Rev. 179, 181 & n.9 (1966); Note, 1966 Wash. U.L.Q. 417, 417 & nn.3-4 James Bennett, Director of the Federal Bureau of Prisons, wrote in 1945:

> "The experienced prison warden knows that it is easy to file a 'hold' against a prisoner for the slightest cause and without the necessity of making out a prima-facie case. Indeed many police departments and sheriffs can file them merely on suspicion. No matter what the basis,

indictment or other formal notification of charges was generally required. Indeed, it was estimated that as many as 50% of all detainers were allowed to lapse on the prisoner's release, without any attempts at prosecution by the jurisdiction that had filed the detainer.[13] There were even cases in which the only reason the detainer had been filed was to increase the severity of the prisoner's sentence.[14] Thus de-

---

> they all operate alike to prevent parole, intensify custody precautions, and increase tensions."

Bennet, Fed. Prob. 8, 9 (July-Sept. 1945). See also *People* v. *Bryarly*, 23 Ill.2d 313, 178 N.E.2d 326 (1961) (detainer despite announced intention of state not to prosecute); *Crow* v. *United States*, 323 F.2d 888 (8th Cir. 1965) (detainer based on complaint, not indictment).

[13] Commissioners' Preface to Uniform Mandatory Disposition of Detainers Act, 9B U.L.A. 363, 364 (1966); Note, 18 Rutgers L. Rev. 828, 835 (1964). Director Bennett estimated that in fiscal year 1958, of 325 detainers disposed of at one federal prison, 211 were abandoned without trial, and only 114 were executed. He commented, "The nuisance value of detainers is illustrated by the 211 detainers lifted at Leavenworth during the year, usually about the time the prisoners involved were finishing their sentences." Bennett, Fed. Prob. 20, 21 (June 1959).

[14] See *People* v. *Kenyon*, 39 Misc.2d 876, 879, 242 N.Y.S.2d 156, 159 (Schuyler Cty. Ct. 1963); Note, 1966 Wash. U.L.Q. 417, 423; Note, 77 Yale L.J. 767, 772-73 & nn.43-44 (1968). Sanford Bates, Commissioner of the New Jersey Department of Institutions and Agencies, in the 1945 symposium that ultimately led to the promulgation of the Agreement wrote of federal abuse of the detainer system:

> "There have been instances, fortunately rare, where Federal judges or prosecuting attorneys have filed warrants against a committed defendant for the sole purpose of

tainers imposed major unjustifiable hardships on prisoners, and, prior to adoption of the Agreement on Detainers, there was nothing a prisoner could do about them.

In addition, the pending charges forming the basis of a detainer might themselves significantly impede the development of a coherent program for the prisoner's punishment and rehabilitation. Often the various charges would arise out of a single criminal episode or out of events occurring within a short period of time. Instead of permitting coordination of sentencing and rehabilitation, the old detainer system often inhibited fair sentencing and effective rehabilitation. The first judge, in sentencing a defendant against whom a detainer had been lodged, would have to decide whether to disregard the other pending alleged offenses or lengthen the sentence to take those offenses into account. The other offenses, if proven, would clearly be relevant in determining whether the offense which was to be the subject of the first sentence was an isolated incident and what length of custody might be necessary for the defendant's re-

---

preventing parole consideration in his case. I have known of cases where two separate charges were filed for the same set of acts; a sentence was imposed on one of them, prosecution suspended on the other, and a warrant filed in the institution to which the defendant was sent with no intention of enforcing it but for the mere purpose of delaying parole."

Bates, Fed. Prob. 16, 17 (July-Sept. 1945). Cf *Cane* v. *Berry*, 356 P.2d 374 (Okla. Crim. App. 1960) (allegations of such abuse).

habilitation. On the other hand, if the judge meted out a long sentence, taking the other offenses into account, there was nothing to prevent other jurisdictions, after they had tried and convicted the defendant on the pending charges, from punishing the defendant further for those offenses.[15] Since, by the nature of the detainer system, the sentences would be served consecutively, the prisoner would then serve a total sentence longer than that intended by the first sentencing judge.[16] Similarly, parole boards and prison authorities found it difficult to formulate the prisoner's rehabilitative program, since they were forced to act without knowing whether the prisoner would be convicted on the other pending charges.[17]

---

[15] For a discussion of the problems facing sentencing judges under the detainer system, see Hincks, Fed. Prob. 3, 3-6 (July-Sept. 1945); Bennett, Fed. Prob. 8, 8-9 (July-Sept. 1945); Perry, Fed. Prob. 11, 11-12 (July-Sept. 1945); Bates, Fed. Prob. 16, 17 (July-Sept. 1945); Donnelly, 32 Conn. B.J. 26, 46 (1958).

[16] See 1966 Wash. U.L.Q. 417, 423. In *United States* v. *Candelaria*, 131 F. Supp. 797 (S.D. Cal. 1955), the court had originally sentenced the defendant to a term of five years. When a detainer was filed and it became evident that local authorities were going to prosecute defendant again for the same crime, the court on its own motion reduced the sentence to 60 days.

[17] See Hincks, Fed. Prob. 3, 4 (July-Sept. 1945); Note, 48 Column. L. Rev. 1190, 1192 & n.18 (1948); Note, 1966 Wash. U.L.Q. 417, 422. New Jersey's Commissioner Bates explained:

> "One of the essential and indispensable elements of good parole is that a program should be arranged in advance of release. The parole board must be assured of employment which is *bona fide* and suitable to the man being

This same uncertainty also often adversely affected the prisoner's attitude towards his own rehabilitation. No matter how well he might behave and how zealously he might work towards his own rehabilitation, there was no way, as long as a detainer had been lodged and was pending against him, whereby he could count on release within a given period.[18] The

---

released, and also it must be satisfied that he is to have as good a home as possible under the circumstances. If the board does not know whether the man is to serve more time or not, it is difficult to arrange such a program. We have no business to annoy employers by importuning them for a job for an inmate and then not having the inmate show up as promised."

Bates, Fed. Prob. 16, 17 (July-Sept. 1945). It was for this reason that prison and parole officials were in the forefront of the movement to reform the detainer system. See, e.g., Bates, *supra*; Bennett, Fed. Prob. 8 (July-Sept. 1945); Fed. Prob. 20 (June 1959) (Director, Federal Bureau of Prisons); Heyns, Fed. Prob. 13 (July-Sept. 1945) (Director, Michigan Department of Corrections); Donnelly, 32 Conn. B.J. 26 (1958) (Member, Connecticut Board of Parole). The Federal Bureau of Prisons urged as early as 1963 that the federal government become a party to the Agreement. See Note, 18 Rutgers L. Rev. 828, 856 n.236 (1964).

[18] See Hincks, Fed. Prob. 3, 4 (July-Sept. 1945); Note, 18 Rutgers L. Rev. 828, 836 & n.63 (1964); Note, 77 Yale L.J. 767, 770 & n.22 (1968). Commissioner Bates recounted one extreme example:

"I recall the case of a man who came before the board of parole at a prison in New York who had no less than 17 warrants pending against him, most of them for forging small checks. Undoubtedly his philosophy had been, after he forged the first one and placed the proceeds on the wrong horse, that he wouldn't get punished much more for two checks than for one and he kept up that process

system also tended to eliminate the possibility of concurrent sentencing, even when the charges in the various jurisdictions all stemmed out of the same criminal episode or occurred within a short period of time.[19]

Moreover, the prisoner subject to a detainer was handicapped by delay in preparing for trial of the charge upon which it was based. As in all cases of trial delay, witnesses might die, evidence disappear, and memories fade. While the state could gather its evidence and preserve it for an eventual trial, the prisoner, confined in another jurisdiction, was often unable to do so, particularly if he could not afford to

---

until finally apprehended. When granted parole, of course, he had to meet each of these warrants in turn and he wasn't as lucky as some because the first judge whom he met was a tough one and sent him back to prison again for two and a half to five years, but then the man had only 16 warrants left to meet. If that's to be his fate on each of them, it doesn't look as though he is ever to have the chance of proving that he has been rehabilitated and I doubt if he ever will be."

Bates, Fed. Prob. 16, 16-17 (July-Sept. 1945).

[19] See *State* v. *Milner*, 78 Ohio L. Abs. 285, 288, 149 N.E.2d 189, 181 (C.P. Montgomery Cty. 1958); Note, 18 Rutgers L. Rev. 828, 849 (1964); Schindler, 35 U. Cin. L. Rev. 179, 182 (1966); Note, 77 Yale L.J. 767, 770 & n.26 (1968). It has been noted that this fact may even deter prosecutors from according defendants a speedy trial, since early prosecutions will merely result in concurrent sentences, whereas delayed prosecutions cannot. See Comment, 31 U. Chi. L. Rev. 535, 540-41 (1964).

retain counsel.[20] Indeed, sometimes he would not even be informed that charges were pending against him.[21]

Finally, even when all jurisdictions concerned were otherwise willing to permit a temporary transfer to accord the prisoner a prompt trial on pending charges, such transfers were hampered by a lack of a uniform set of rules as to the mechanics of such transfers. Arrangements would have to be made for payment of the cost of transfers, prisoner upkeep, pursuit and recovery in the event of escape and prompt return.[22] There was no guarantee to the sending state that the receiving state would try and

---

[20] See, e.g., *Nickens* v. *United States*, 323 F.2d 808, 813 (D.C. Cir. 1963), *cert. denied*, 379 U.S. 905 (1964) (Wright, *J.*, concurring); *Taylor* v. *United States*, 238 F.2d 259, 262 (D.C. Cir. 1956); *United States* v. *Provoo*, 17 F.R.D. 183, 203 (D. Md.), *aff'd mem.*, 350 U.S. 857 (1955); Comment, 31 U. Chi. L. Rev. 535, 537 n.14 (1964); Schindler, 35 U. Cin. L. Rev. 179, 182 (1966); Note, 18 Rutgers L. Rev. 828, 834 (1964); Note, 1966 Wash. U.L.Q. 417, 423-24; Note, 77 Yale L.J. 767, 769 (1968).

[21] See, e.g., *Fouts* v. *United States*, 253 F.2d 215, 218 (D.C. Cir. 1958); *Taylor* v. *United States*, 238 F.2d 259, 261 (D.C. Cir. 1956); *Ex parte State ex rel. Attorney General*, 255 Ala. 443, 52 So.2d 158, 161 (1951); *Pellegrini* v. *Wolfe*, 225 Ark. 359, 366, 283 S.W.2d 162, 165-66 (1955) (Robinson, *J.*, dissenting); Schindler, 35 U. Cin. L. Rev. 179, 182 n.10 (1966); 18 Rutgers L. Rev. 828, 844 (1964).

[22] Director Bennett noted in 1959: "While under present procedures a prosecutor in one state can secure for trial an offender imprisoned in another state, this requires a special contract with the executive authority of the incarcerating state, a method burdened with so much red tape that it is seldom used." Bennett, Fed. Prob. 20, 22 (June 1959). See also Note, 18 Rutgers L. Rev. 828, 849 (1964).

return the prisoner promptly—or return him at all. Indeed, at least one state refused to participate in such transfers because of a tendency on the part of receiving jurisdictions not to return the borrowed prisoners.[23]

It was to remedy these problems that the present Interstate Agreement on Detainers was adopted in 1970 on behalf of the United States and the District of Columbia by way of the Interstate Agreement on Detainers Act.[24] The Agreement adopted by the Act provided the prisoner with a method of clearing detainers and charges outstanding against him and provided prosecutors with a uniform set of rules governing temporary transfers for purposes of trial. Under the Agreement, prison authorities must notify a prisoner immediately of any detainers lodged against him and must inform him of his rights under

---

[23] See Note, 18 Rutgers L. Rev. 828, 849 & n.176 (1964).

[24] A brief history of the promulgation of the Interstate Agreement on Detainers is given in Bennett, Fed. Prob. 20 (June 1959).

The Joint Committee on Detainers (later entitled the "Committee on Detainers and Sentencing and Release of Persons Accused of Multiple Offenses"), sponsored by the Council of State Government, issued a statement of principles in 1948 and, in 1955 and 1956, a series of proposals. Drafts of the proposals were submitted to a conference sponsored by the Council of State Governments, the American Correctional Association, the National Probation and Parole Association, and the New York Joint Legislative Committee on Interstate Cooperation. Two drafts were approved. The first, "Disposition of Detainers Within the State," was proposed as a model statute for the resolution of detainer problems within a single jurisdiction.

the Agreement. Article III then affords him the right to demand trial on the charges underlying the detainer. In response to such a demand, the prison authorities must offer custody of the prisoner to the authorities that have lodged the detainer. Art. V(a). If the latter refuse to accept custody, the indictment on which the detainer is based must be dismissed with prejudice. Art. V (c). If instead they accept custody, they must try the prisoner within 180 days, unless a continuance is granted in open court. Art. III(a).

Article IV governs requests initiated by the prosecutor. In part, Articles IV and V alleviated the problems that previously had plagued interjurisdictional transfers for purposes of trial. Trial must be commenced within 120 days (plus continuances for good cause granted in open court) and the prisoner returned as expeditiously as possible. Arts. IV(c) and V(e). Article V also governs the handling of expenses and escape. In part the limitations imposed by Article IV constitute necessary corollaries to those imposed by Article III, since without the Article IV limitations prosecutors would be able to avoid the limitations under Article III merely by arraigning the prisoner without any intention of granting a prompt trial, thereby circumventing the requirements of the Agreement.

Our interpretation of the Detainers Act should reflect Congress' purpose, as revealed in the foregoing history, which was to provide a comprehensive and coherent solution to a multiplicity of problems that had prior to the adoption of the Act beset prisoners,

prosecutors, judges, prison authorities, and parole boards alike under the old detainer system. Under the Act a prisoner can force the expeditious disposition of outstanding detainers and their underlying charges. Similarly prosecutors can more easily obtain prisoners for trial; judges and prison and parole authorities can more rationally administer punishment and rehabilitation. Whether or not the Act should apply to a case where the sole federal intervention is the issuance of a habeas writ, see, e.g., *United States* v. *Mauro*, Slip Opin. at 265 (2d Cir. Oct. 26, 1976) (Nos. 76-1251, 76-1252), the speedy trial provisions must surely apply to a state prisoner like Ford, against whom a federal detainer was lodged for years. To hold that the proviso to Article IV(a) precludes application of those provisions in such a case would be to stand the Act on its head.

The Article IV(a) proviso plays a very minor role in the Act's general structure. One of the problems involved in formulating a workable transfer procedure among states was to preserve states' rights to refuse extradition, and it is this right that the Article IV(a) proviso embodies.[25] While there is some dispute as to the extent of a state's right to refuse to comply with a federal writ of habeas corpus ad prosequendum,[26] there is no evidence that the Article IV

---

[25] See 31 U. Chi. L. Rev. 535, 552 (1964).

[26] Compare *United States* v. *Mauro*, Slip Opin. at 280 & n.1 (2d Cir. Oct. 26, 1976) (Nos. 76-1251, 76-1252) (Mansfield, *J.*, dissenting), and Schindler, 35 U. Cin. L. Rev. 179, 191-92 & n.46 (1966), with *United States* v. *Mauro*, *supra*, at 271, and

(a) proviso and its adoption by Congress were intended to augment or diminish that right in any way; it rather appears that they were merely intended to preserve prior law with respect to interstate transfers.

Thus we are asked to take a hypothetical and possibly non-existent conflict between a minor provision of the Act which relates to transfer mechanics (the Art. IV(a) proviso) and prior federal law (28 U.S.C. § 2241) and to use it as the touchstone for an interpretation of the rest of the Act that would vitiate its operation insofar as it affects federal detainers, since virtually all federal transfers are conducted pursuant to the writ.[27] This, in turn, would substantially impair the operation of the Agreement as a whole, since federal detainers form a large percentage of all detainers outstanding.[28] Given this choice, we are con-

---

Comment, 31 U. Chi. L. Rev. 535, 541 (1964). The Supreme Court has reserved the issue. *Carbo* v. *United States*, 364 U.S. 611, 621 n.20 (1961). While the author of the present opinion adheres to his position in *Mauro*, we need not decide the question here.

[27] The government here has so conceded.

[28] See Note, 77 Yale L.J. 767, 775 & n.73 (1968). Available statistics are spotty but illustrative. For example, in 1963, of 96 detainers filed in a leading Illinois prison, 52 were filed by the federal government (54%). Comment, 31 U. Chi. L. Rev. 535, 540 & n.30 (1964). In the first half of 1962, the federal government was responsible for 70 out of 222 out-of-state detainers filed in California (32%). Note, 18 Rutgers L. Rev. 828, 857 & n.238 (1964). The record for Michigan

strained to hold that, whether or not a writ of habeas corpus ad prosequendum constitutes a "detainer," see *United States* v. *Mauro*, *supra*, once a federal detainer has been lodged against a state prisoner the habeas writ constitutes a "written request for temporary custody" within the meaning of Article IV of the Detainers Act.

Turning to whether the government violated the limitations of the Act in this case, Article IV(e) provides:

> "If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e), hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

Appellant argues that the government violated this provision by returning him to Massachusetts custody on June 14, 1974, prior to trial. The provision, however, which is intended to avoid the disruptions in a prisoner's rehabilitation occasioned by repeated transfers between jurisdictions, is thus for his benefit and is waivable. Here, appellant himself requested the

---

State Prison at Jackson in 1944, used as an example by Director Heyns at the 1945 symposium, was similar: Of 109 detainers filed, 46 were filed by federal officials (42%). Heyns, Fed. Prob. 13, 15 n.1 (July-Sept. 1945).

transfer and by doing so waived his objection to it under Article IV(e)."[29]

Article IV(c), however, provides in addition that:

> "[T]rial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open Court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance."

Although appellant waived his right not to be returned prior to trial, he did not thereby waive his right to a speedy trial. On the contrary, beginning shortly after his arrest he repeatedly insisted on a prompt trial. Almost immediately after his arrest he sent a letter to the United States Attorney requesting that he be tried as expeditiously as possible. He objected to each continuance or delay in the trial when he was afforded an opportunity to object and twice moved for dismissal on speedy trial grounds. His request to be returned to Massachusetts custody was made only after it became evident that trial would be substantially delayed at the government's request.

Custody of appellant was obtained pursuant to the writ on April 1, 1974. Appellant was not tried until

[29] In this case we need not decide whether the failure of a prisoner to express a preference as to the place of his incarceration pending trial, either through ignorance of his statutory right or otherwise, would nevertheless constitute a waiver of that right.

September 2, 1975, more than 13 months beyond the expiration on July 30, 1974, of the 120 days permitted under Article IV(c). The question, therefore, is whether the 120-day period was extended through the granting of "necessary or reasonable" continuances, "for good cause shown in open court, the prisoner or his counsel being present."

Trial was originally set for May 28, 1974, well within the 120-day period. In response to the government's request for a continuance in which to attempt to apprehend appellant's co-defendant, however, trial was postponed to August 21, 1974. The proceeding took place in open court, with both the defendant and his counsel present. The government's reasons for requesting the adjournment were set forth in a sealed affidavit filed with the court. While we do not believe that the public interest would be served by disclosure of the contents of that affidavit, we have reviewed it and hold that the continuance was "necessary" and "reasonable" and was granted "for good cause." The later delay from November 18 to February 18, 1975, also supported by sealed affidavit and also granted in open court, was similarly justified.[30]

The remaining delays, however, cannot be so justified. When Judge Bauman resigned and the case was transferred to Judge Motley, the trial date was post-

[30] We do not believe that the requirement of Article IV(c) that good cause be shown in open court was intended to preclude proceedings by way of sealed affidavit where circumstances warrant, but merely to prohibit *ex parte* and *sua sponte* continuances.

poned from August 21 to November 18, 1974, without explanation. Part of this delay may have been occasioned by the transfer of the case. The larger part, however, can only be accounted for on the assumption that Judge Motley's calendar was already full. As we have previously stated, under such circumstances it is the responsibility of the trial judge to reassign cases to assure defendants their right to a speedy trial. *United States* v. *Drummond*, 511 F. 2d 1049, 1053 (2d Cir.), *cert. denied*, 423 U.S. 844 (1975). Similarly on February 18, 1975, the trial date set after the government's second motion for a continuance, the trial judge found herself in the middle of another trial and, instead of reassigning the case to a judge able to accord the defendant a prompt trial, postponed the trial to June 11, 1975. Subsequently, because of a program undertaken by the court to dispose of civil cases, the trial judge *sua sponte* set a new trial date of September 2, 1975. None of these delays, which together total over nine months, were "necessary," "reasonable," or "for good cause" within the meaning of Article IV(c).

Not only were the delays unjustified, but two of the three were not granted "in open court, the defendant or his counsel being present." Both the adjournment from August 21 to November 18, 1974, and the adjournment from June 11 to September 2, 1975, were granted *sua sponte* without any type of formal hearing. We have previously emphasized, outside of the context of the Detainers Act, the importance of granting the defendant an opportunity to be

heard before granting an extended, criminal trial continuance. *United States* v. *Didier*, Slip Opin. at 73, 86 (2d Cir. Oct. 13, 1976) (No. 76-1331.) The Detainers Act imposes similar requirements for similar reasons: unless the defendant is given an opportunity to participate, his speedy trial rights may be whittled away in the nonadversary context of ex parte communications between the government and the court. We therefore hold that appellant's rights to a speedy trial under Article IV(c) of the Detainers Act were violated here.

We are left with the question of whether such violations warrant reversal of the convictions below. Article V(c) of the Detainers Act dictates the answer:

> "[I]n the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending *shall* enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect." (Emphasis supplied).

Whatever might be our conclusion if such a provision did not exist,[31] the language actually enacted is

---

[31] We note in this regard that appellant alleges that the detainer caused him to be denied certain opportunities during the years it was pending and deprived him of the opportunity to serve his entire federal sentence concurrently with the

mandatory on this court. We therefore reverse the conviction and remand the case for dismissal of the indictment with prejudice.

MOORE, *Circuit Judge* (dissenting):

I am greatly impressed by Judge Mansfield's most learned and exhaustive treatise on the history of, and the *raison d'etre* for, the enactment of the Interstate Agreement on Detainers Act.

However, turning to the facts of the case before us on appellate review, I find that after a jury trial before Judge Motley, the appellant Richard Ford was convicted of (1) bank robbery; (2) unlawful use of firearms; (3) transportation of a stolen automobile in interstate commerce; and (4) conspiracy. The robbery was committed at Middletown, New York on October 20, 1971. On November 11, 1971 a warrant for Ford's arrest was issued, but he remained a fugitive until October 11, 1973 when he was arrested by the FBI in Chicago, Illinois. On October 17, 1973 the FBI turned him over to Illinois authorities for extradition to Massachusetts for trial resulting from a 1968 escape from prison. On February 8, 1974, after a guilty plea to the Massachusetts charges, Ford was sentenced to concurrent terms of eight to ten

---

state sentence. Such prejudice, were appellant able to substantiate his allegations, was specifically recognized in *Smith* v. *Hooey*, 393 U.S. 374 (1968).

years, which sentence he is presently serving. At this point begin the events at issue before us.

On March 21, 1974 Ford was charged in the Southern District of New York with the bank robbery and related charges above mentioned. To enable him to plead promptly, Ford was produced on April 1, 1974 in New York pursuant to a writ issued on March 25, 1974 for that purpose. At the arraignment Ford requested his return to Massachusetts to prepare for his trial there and to be with his family. The request was granted. Despite this return, the Government was apparently ready to proceed immediately in New York, a notice of readiness having been filed on April 1, 1974.

Ford was not alone in his Middletown robbery. On April 3, 1974 a superseding indictment was obtained to include James Flynn, a fugitive. Again Ford came to New York to plead, and again he requested a return to Massachusetts. Trial was set for May 28, 1974.

It may well be argued that we should not be concerned with the gravity of Ford's alleged crimes. Nor is this the time or place to debate the wisdom of speedy trial legislation enacted without any provision by way of judges available for its implementation. However, from our appellate ivory tower, we ought at least to scan the practicalities of the situation.

The majority have found that Ford himself waived his objections under Article IV(e) of the Interstate Agreement on Detainers Act. They then turn to Article IV(c), containing the words so well known to the

law as entirely dependent on the facts, namely, "for good cause" and "necessary or reasonable". On such facts as are known to them, they say that until February 18, 1975 the continuance was "necessary" and "reasonable" and was granted "for good cause".

At this point apparently the determinative facts become of little, if any, importance to the majority. We know that Judge Motley on February 18, 1975 was in the midst of effecting justice for another person—probably in a speedy trial. We also know that under the individual calendar system this was Judge Motley's case. The majority fault Judge Motley for postponing the case on June 11, 1975 "instead of reassigning the case to a judge able to accord the defendant a prompt trial". This statement assumes Judge Motley's power to do so and assumes that, after canvassing the other twenty-five judges a calendar-free judge could have been found. With all of our other duties, I do not regard it as a function of the Court of Appeals to act as a calendar clerk for the district courts.

In short, although there has been factual support for the majority's opinion that the delays up to February 18, 1975 were reasonable and necessary, there are no facts upon which to base a contrary assumption thereafter despite easy access thereto.

I do not find any violation of Ford's rights under the guidelines of *Barker* v. *Wingo*, 407 U.S. 514 (1972). Not being willing to thwart the jury's determination of guilt by post-conviction calendar technicalities, particularly where no showing of prejudice

therefrom has been made, I would affirm the convictions, or at most remand for a factual determination of the essentials of "good cause" and "necessary or reasonable".

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of February one thousand nine hundred and seventy-seven.

Present: HON. LEONARD P. MOORE

HON. WALTER R. MANSFIELD

HON. THOMAS J. MESKILL

Circuit Judges

76-1319

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JAMES PATRICK FLYNN, DEFENDANT

RICHARD THOMPSON FORD, a/k/a VINCENT A. THOMAS, a/k/a JOHN A. AUGUST, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

by
Vincent A. Carlin
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of May, one thousand nine hundred and seventy-seven.

Present: HON. LEONARD P. MOORE

HON. WALTER R. MANSFIELD

HON. THOMAS J. MESKILL

Circuit Judges

76-1319

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JAMES PATRICK FLYNN, DEFENDANT

RICHARD THOMPSON FORD, a/k/a VINCENT A. THOMAS, a/k/a JOHN A. AUGUST, DEFENDANT-APPELLANT

A petition for a rehearing having been filed herein by counsel for the appellee, United States of America,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

/s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of May, one thousand nine hundred and seventy-seven.

76-1319

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JAMES PATRICK FLYNN, DEFENDANT

RICHARD THOMAS FORD, a/k/a VINCENT A. THOMAS a/k/a JOHN A. AUGUST, DEFENDANT-APPELLANTS

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellee, United States of America, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 238643 27